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HAS THE RULE OF REASON DOCTRINE TAKEN THE LOCK-STEP OUT OF THE SHERMAN ACT?

In 71 Cent. L. J. 376, we expressed the view that the late construction, or, as we might say, the belated construction, of the anti-trust act has created brand new problems as to its enforcement on the criminal side of the court.

We have observed that the attorneys for the defendant in the meat trust, pending in Chicago, were quick to seize upon the new idea, and that the federal judge in whose court they have been ruled to trial, contented himself with a formal overruling of their contention. What significance this bears we do not undertake to say. The contention may have been regarded by the judge as frivolous, or he may have considered it his duty to refer such a deadly assault upon the anti-trust act to the tribunal, that has enunciated the new rule—let the principle proclaimed be regarded as *obiter* or a necessary part of the Standard Oil decision.

That the point is not to be considered frivolous, the dissenting opinion of Justice Harlan and what he instances for support on this subject would seem to bear witness, as the distinguished jurist quotes with approval from Senator Nelson, a very distinguished lawyer, in an adverse report to the Senate as to the amending of the anti-trust act.

Senator Nelson said: "The anti-trust act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and, hence, to that extent utterly nugatory and void, and would practically amount to a repeal of that part of the act. * * * And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable."

Senator Nelson further said, in quotation made by Justice Harlan, of such a change, that "to destroy or undermine it (the anti-trust act) at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity."

It is further to be noted that the chief justice alluded in no way whatever to the operation of the new principle in criminal prosecutions, and, probably, it is clear he should not have done so.

It is easy, however, to see, that if the eight justices, with whom Justice Harlan differed, thought that the rule-of-reason doctrine would have the effect of disemboweling the act as a penal statute, this would have been a very potent argument against their holding as they did. Therefore, it is to be presumed, that they believe that the Sherman law contains all of the elements of certainty required in a criminal statute. It cannot be supposed, that they overlooked the view expressed by Senator Nelson and approved by Justice Harlan, as the latter must have urged it in the conference room of the justices.

Assuming, then, that indictments may be framed and prosecutions get to juries for alleged violations of the Sherman Act, the inquiry remains whether it is capable of practical enforcement.

Certainly it seems incapable of anything like uniformity in enforcement—at least

not until the supreme court, after much tribulation on the part of the government and glorious uncertainty favoring defendants, shall have shown some eight score of federal trial judges precisely how to proceed, if it ever does.

In such enforcement the question of reasonableness or unreasonableness is, of course, for juries. The latitude of inquiry in the development of such an issue is to be measured practically only by the ingenuity of counsel at the trial, assisted in advance of prosecution, by manipulation of the laws of supply and demand. In this the exercise of all the tricks in high finance that would help to make the false appear to be the true and their acts in furtherance rather than in unreasonable restraint, of commerce, would appear.

We might admit that the judges who are to try such cases could, were they allowed, puncture the pretenses upon which adept violators of the Sherman Act, guided by astute counsel, might build their hopes of escape. But these judges would find it hard, if not impossible, to keep out the evidence to show not only how *reasonable* was the restraint that was imposed on commerce, but what a blessing the actors were conferring on that very commerce.

Indeed, it may be, that powerful interests prosecuted under the Sherman Act could furnish all the proof necessary to put aureoles around the brows of their directors, enjoying a gilded martyrdom for their country's good.

It seems to us, that the very last tribunal, in which a contention would raise its head that uncertainty in the description of a penal offense is no objection to its being brought to bar, with any show of success, is a federal court.

The theory upon which the federal government lives and moves and has its being is essentially different from that of any one of the states, or, as far as that is concerned, from any government not acting for sovereign constituents in federation.

It is an agency empowered to guard instrumentalities against interference lessening the efficiency of delegated power. Therefore all of its legislation is regulation. Its statutes are mere rules, and should bear upon their face the clearest certainty. Nothing this agency can forbid comes within the description of *malum in se*, but, of its very nature, it is *malum prohibitum*, and the boundary therefore between what is lawful and what is unlawful should be clearly defined.

Especially is this true as to those things which concern interstate commerce, because the plain course of decision as to this is, that the states can legislate with regard to it, when Congress has not covered the ground and state legislation is not a direct interference. Shall we *now* say the states can act, if Congress has not covered the ground, when its statute is not in *unreasonable* restraint of trade?

This Sherman Act, which fails to denounce a combination or contract in direct interference with interstate commerce, unless it be an unreasonable interference, is greatly like the ancient philosopher's description of the world: "Beautiful, vague, mysterious, round and pointed like a ball."

NOTES OF IMPORTANT DECISIONS

DIVORCE -- HABITUAL DRUNKENNESS CURED AT TIME OF DECREE.—The St. Louis Court of Appeals seems to us to have announced an untenable position in holding that, where for more than the statutory period a husband had been an habitual drunkard, proof that he had overcome the habit could not defeat the wife's action for divorce. Tarrant v. Tarrant, 137 S. W. 56, Reynolds, P. J., not sitting.

That court thus speaks on this subject: "Nor will the fact that the defendant became cured of his habit after he had been addicted to it for the statutory period and the suit had been commenced be permitted to defeat the plaintiff's suit, there having been no condonation within the meaning of the law. Defendant cannot be too highly commended for his final success in overcoming the habit which appears to have been the only substantial fault of an otherwise good man, but his success comes too late for the law to aid him. 1 Bishop, Marriage, Divorce and Separation, § 1775; Moore v. Moore, 41 Mo. App. 176."

The facts of the principal case show, we think, that such a principle ought not to be deemed sound, unless there is no possible way of refusing to yield to it. Thus it appears from the case that this marriage has been dissolved upon a literal application of the statute for the benefit of one party, when the ground for divorce has disappeared and two children of very tender years have been virtually deprived of a home formed by both parents, because of an offense that has been expiated. We do not read the Missouri statute or any other of like tenor as the St. Louis Court of Appeals. A right to a divorce is not in any sense a vested right. It is a right to show the existence of certain facts as ground for divorce upon a presumption that the marriage tie were better, in the interest of society, to be dissolved.

This cannot be illustrated better than by divorce being grantable for habitual drunkenness continued for one year. If this does not mean that the law grants the divorce because, and only because, it is a fair presumption that the drunkenness will continue in the future, it is a very foolish law. Why should any woman have to live with an habitual drunkard six months or nine months, if he is not fit to live with more than a year—if habitual drunkenness is of itself obnoxious to the marriage relation?

But if the law fixes the period of one year because of the presumption of a continuing habitual drunkenness, it is based on a sensible presumption, and it is willing to say that thereunder the wife should not be afflicted in the future and indefinitely.

Taking it, however, that the law of divorce is to provide decrees, which are inherently prospective in their nature, more than merely adjudicating upon present rights, what excuse can there be for granting a divorce to protect from an evil that has faded out of existence?

We admit that it would generally be difficult to show this, but in the principal case the court says it would avail nothing, however clearly it might be shown. The spirit and reason of divorce legislation is to give relief from a supposedly intolerable condition. Cessante ratione legis, cessat ipsa lex.

We respectfully dissent from the spirit underlying the decision by an able court, on the ground, that the doctrine should be inculcated that divorce is always to be regarded as grantable in the supposed interest of society and not for any personal right of an applicant.

In Louisiana it is said there must be conclusion that the habit has become fixed and confirmed. Mack v. Handy, 39 La. Am. 491, 2 So. 81.; De Lesaerinere De Lesdesiner, 45 La. Ann. 1364, 14 So. 191. In Massachusetts it is said that certain evidence was sufficient to justify the conclusion that the habit was "confirmed." Blaney v. Blaney, 126 Mass. 405. In Rhode Island it was held the proof should show the habit is "confirmed." Gouslay v. Gouslay, 16 R. I. 705, 19 Atl. 142.

These cases are within the reason and life of the law.

That some single acts uncondoned give ground for divorce argues nothing. They generally imply there is an absence of moral character on the part of their perpetrators and anything almost can be mended but that. With drunkenness it is different. The law regards that pityingly and says, if it is not confirmed, it is no ground for divorce.

CONTEMPT OF COURT—CIVIL AND CRIMINAL CONTEMPT DISTINGUISHED—THE RIGHT OF DEFENDANT TO REFUSE TO TESTIFY AND THE MEASURE OF PROOF IN THE LATTER.—In the case of Gompers v. Bucks Stove & R. Co., 31 Sup. Ct. 492, it was held that there was a proceeding in civil contempt to punish an act of which the court had no other jurisdiction than by a proceeding in criminal contempt, and the judgment was set aside, notwithstanding that all the parties went to trial without objection to the form of procedure.

Justice Lamar, speaking for the court, goes into much detail to show the nature of the proceeding, instancing that the case was entitled as one in civil contempt, was part and parcel of the suit in which there was an alleged contempt and the prayer for relief was remedial in behalf of the plaintiff, instead of punitive for the vindication of the court.

The importance of proper procedure according to the character of the contempt is shown as follows: "Notwithstanding the many elements of similarity in procedure and punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

In this case each of the defendants was made a witness for the Stove and Range Company and was required to testify against himself.

But the character of the act as placing it in the category of criminal and not civil contempt presents a narrow question.

Thus it appears that the court had enjoined the defendants from boycotting the plaintiff or from publishing, that it was, or had been on the "unfair" list. Despite the injunction they published statements that the complainant was on such list.

The court says: "The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act) and doing an act forbidden (punished by imprisonment for a definite term) is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment. In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months, no relief whatever was granted to the complainant."

Here then it must be admitted that the sentence was punitive and not remedial, but that does not necessarily say the procedure was wrong, and that the act of disobedience was one only in criminal contempt.

To disobey an injunction by an affirmative act seems just as truly contempt of remedial process as to disobey it negatively. For example the court in this case, it seems to us, might at least have imprisoned defendants until they ceased publishing the complainant as being on the "unfair" list.

But considering that the publication was a past act, and yet was nothing in its commission but the disobedience of process, and not in facie curiae, should the constitutional rule apply because the technical procedure is in criminal contempt? To say yes protects one in his privilege of not being compelled to testify against himself and of proof of guilt beyond a reasonable doubt being necessary, not because of the inherent criminality of that of which he is accused, but because of the mere name given to the form of procedure, whereby he is called to answer for an offense. We beg to think that such is not a proper test, and, if it were, courts ought not to be allowed to try cases of criminal contempt without the aid of a jury.

We are a believer in summary proceedings by the court without a jury in all contempt, civil and so-called criminal, because it is not only recognized procedure from time immemorial but because it is absolutely necessary for the efficient performance of duties by courts, but we should not get ourselves confused, as we respectfully say Justice Lamar has gotten himself confused, by mere terminology.

THE LIABILITY OF THE INITIAL CARRIER UNDER THE INTERSTATE COMMERCE ACT.

Introduction.—Congress, in order to meet the pressing needs disclosed by repeated decisions of the American courts adverse to shippers, and to prevent palpable injustice to them, on June 29th, 1906,[1] passed an act, which was an amendment to the Railroad Rate Bill. The amendment was introduced when the bill reached the Senate, by Senator Carmack of Tennessee, and is known as the seventh section of the Hepburn amendment to the Interstate Commerce Act of February 4th, 1887,[2] amending the twentieth section of that act. The amendment as finally agreed upon, after numerous conferences, and as passed by Congress, and signed by the President, is as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

(1) Act Cong., June 29, 1906, c. 3591, sec. 7, 34 Stat. 593, (U. S. Comp. St. Supp. 1909, p. 1167).

(2) Act Cong., Feb. 4, 1887, c. 104, sec. 20, 24, Stat. 379, (U. S. Comp. St. 1901, p. 3154).

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The growing importance of this act is evidenced by the numerous adjudications thereunder since its passage; and the benefits to the shippers are incalculable, when the inconvenience and injustice to which they were subjected prior to its passage, is considered.

The writer proposes to treat the amendment under four general heads: First, The necessity and purpose of the act; second, the courts which have jurisdiction for the enforcement of the act; third, the question of its constitutionality; fourth, the right of the carrier, since the passage of the act, to limit its liability; and fifth, the general application of the act in the courts.

I. The Necessity and Purpose of the Act.—The intention of the amendment was to do away with legal technicalities causing delay and injustice to the shippers, and to establish a uniform rule of liability in interstate commerce, whereby the initial carrier becomes responsible to the shipper for all loss, injury and damage occurring to the shipment from the time of its receipt by the initial carrier until delivery to its final destination by the last connecting carrier, and in turn, to give the initial carrier, if not himself primarily liable for the negligence, a right of action against the negligent secondary or delivering carrier. The purpose of the amendment as expressed by Senator Richardson, of Alabama, while the bill was pending in the Senate, shows its necessity. He said:[3]

"One of the great complaints * * * * has been, and I think, a reasonable, just and fair complaint, that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles probably to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California, or some distant place to institute his suit. Why? The reason inducing us to do that was that the initial carrier has a through-route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at very heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through-route courtesies between them would be broken up if prompt payment was not made."

Previous to the passage of this amendment, two rules had been in force, one, known as the "English Rule," and the other known as the "American Rule." The English rule is similar to the amendment, but by reason of the exceptions to it adopted by the majority of the American courts, great injury, loss and damage have resulted to the shippers.

The weight of authority supports the "American Rule," which is as follows:[4]

"According to the American rule, the first carrier is prima facie liable only with reference to the transportation over his own line, a contract for through transportation by which the liability of the first carrier is limited to his own line is valid, even in states where limitation of liability is prohibited by statute, and liability beyond the receiving carrier's line being the result of contract, the carrier may impose on the assumption of such contract relation any limitation which he sees fit."

(3) Cong. Record, Part X, 59th Cong., 1st Sess., p. 9580.

(4) 6 Cyc. 489-490 and notes.

Some states[5] (but the minority) have adopted the "English Rule," which, as laid down by Lord Abinger, C. B., is that:[6]

"It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind inter se, and should be taken each to have made the others their agents to carry forward."

The passage of this amendment was intended for the sole purpose of doing away with the confusion resulting from the diversity of opinions in the various courts and of relieving the shippers of their difficulty in recovering for losses caused by negligence of the various carriers who handled their shipments.

"Congress recognized the difficulty shippers, especially small shippers, had where goods were lost, and especially when they were damaged, to trace the goods and fix the liability and recover their loss. Not infrequently the effort to do so involved more time and expense than the value of the goods damaged or lost. It recognized the additional fact that the facilities of the initial carrier were much greater than those of the shipper to locate the goods and fix the liability for loss or damage, and that it was, at all events easily within the power of the carriers to adopt methods by which it could be done; methods, too, which were absolutely denied the shippers by reason of manifestly insuperable obstacles and conditions. The evident purpose of Congress in the enactment of the statute under consideration, was to enable the shipper to have recourse to the receiving carrier, and leave it to its recourse upon the particular Company which inflicted the injury. The act, I think, rests on a substantial and visible reason of public policy, which must address itself to every fair mind cognizant of the conditions which inspired this remedial legislation regulating the immense volume of interstate commerce in this vast country."[7]

(5) See (1869) Lock Co. v. R. Co., 48 N. H. 339; 2 Am. Rep. 242; (1906) Allen v. Pac. R. Co., 42 Wash. 64; 84 Pac. 620, and cases cited.

(6) (1841) Muschamp's Case, 8 M. & W. 421.

(7) (1908) Smeltzer v. St. L. & S. F. R. Co. (Ark.) 158 Fed. 649-666, per Rogers, J.

II. Jurisdiction.—What courts have jurisdiction for the enforcement of this amendment?

The impression prevailed at first, that only the United States Circuit and District Courts, and the Interstate Commerce Commission had jurisdiction, because of the provisions of sections eight and nine of the original Act of February 4th, 1887, which sections give to those courts and the commission, concurrent and exclusive jurisdiction of the special matters therein contained. There is, however, no provision as to jurisdiction in the amendment of June 29, 1906, which we are now considering, and therefore the ordinary rule of construction would apply, which is, that in the exercise of rights under federal legislation, the federal and state courts have concurrent jurisdiction, unless it is expressly negatived in the enactment.

It is evident that it never was the intention of Congress to confer upon the Interstate Commerce Commission any jurisdiction to enforce or apply this statute, because the Commission's process and practice, being limited in scope, and of a totally different nature, and for a different purpose, it would be impracticable. Its procedure is only applicable for the establishment and enforcement of rates, the preventing of rebates, etc.

As was said by one court:[8] "The Interstate Commerce Commission is not a court. It cannot try controversies like this between shipper and carrier, and give judgment against the carrier for the damages sustained. It was not contemplated by the Act that the time of the Interstate Commerce Commission should be consumed by such controversies. The Commission is given jurisdiction to hear complaints in regard to rates, rebates, and the like, and the language of the statute in reference to complaints to the Commission must be construed as relating to those subjects which are within the jurisdiction of the Commission."

And the same court, speaking of the United States Courts, said: "The Circuit

(8) (1909) L. & N. R. Co. v. Scott, 133 Ky. 724; 118 S. W. 990.

Courts of the United States are without jurisdiction in an action where the matter in controversy is less than $2,000, and so this action could not have been brought in the United States Circuit Court, as the amount in controversy is only $275. It was not the purpose of the Interstate Commerce Act to give the United States Courts jurisdiction of cases of this sort where the amount in controversy is less than $2,000. If, therefore, the State Court is without jurisdiction to hear the matter, the plaintiff is without remedy, and manifestly it was not the purpose of the amendment to leave the plaintiff remediless."

None of the cases decided previous to the passage of the amendment are applicable,[9] although cited by those who contend that the state courts have no jurisdiction.[10] This is not a penal statute, and it only provides a new remedy, which had not heretofore existed. It is evident that the state courts have jurisdiction of actions arising under this amendment, and concurrent jurisdiction with the federal courts when the amount involved is over $2,000, or where there is a diversity of citizenship; and under no circumstances has the Interstate Commerce Commission any power or jurisdiction for the enforcement of this amendment.

As stated by one text-writer:[11] "This is a law that may be enforced either in the state or federal courts. This is true because there is nothing in the law which makes the exercise of jurisdiction by state courts incompatible with the purpose of the clause; and it cannot be implied that Congress has given the federal courts exclusive jurisdiction over suits for damages arising out of a breach of contract to transport goods from one state to another, merely because it passed a law making the initial carrier liable for the acts of its agents to whom it delivered the goods."[12]

III. The Constitutionality of the Act.—The amendment to the Act has been subjected to most careful scrutiny by all the courts which have applied it with reference to its constitutionality, and the conclusion is, that the power in the federal legislature to pass such an Act is contained in the commerce clause of the Constitution,[13] which authorizes Congress to regulate commerce between the states and territories.

It does not infringe state sovereignty,[14] it does not interfere in any manner with the rights of the states,[15] it does not operate to take private property for public purposes,[16] it does not interfere with the liberty of contract,[17] or the freedom thereof,[18] it does not deny to a carrier the equal protection of the laws,[19] it is not a taking of the carrier's property without due process of law,[20] and it is not depriving a common carrier of life or liberty or property without due process of law.[21]

(9) Such as (1904) Rwy. Co. v. Moore, 98 Texas 302; but see (1909) G. H. & S. A. R. Co. v. Piper (Texas) 115 S. W. 107.

(10) (1909) 1 Drinker on Interstate Commerce Act, p. 456.

(11) (1910) Watkins on Shippers & Carriers, Sec. 201, p. 268.

(12) See, also, the following cases affirming the jurisdiction of the state courts; (1909) So. Pac. Co. v. Crenshaw, 5 Ga. App. 675; 63 S. E. 865; (1909) L. & N. R. Co. v. Warfield & Lee, 6 Ga. App. 550; 65 S. E. 308; (1910) H. & T. C. R. Co v Lewis, (Texas) 129 S. W. 594; (1909) Smeltzer v. St. L. & S. F. R. Co. (Ark.) 168 Fed. 420; (1910) St. L. & S. F. R. Co. v. Heyser, (Ark.) 130 S. W. 562; (1910 Shultz v. S. R. Co., 122 N. Y. S. 445; 66 Misc. R. 9; (1908) G. H. & S. A. R. Co. v. Piper, (Texas) 115 S. W. 107.

(13) Subdivision 3, section 8, article 1. This amendment is constitutional; Atlantic C. L. R. Co. v. Riverside Mills, 31 Sup. Ct. 164; 72 Cent. L. J. 129.

(14) (1909) G. H. & S. A. R. Co. v. Wallace, (Texas) 117 S. W. 169.

(15) (1909) G. H. & S. A. R. Co. v. Piper, (Texas) 115 S. W. 107.

(16) (1909) L. & N. R. Co. v. Scott, 133 Ky. 724; 118 S. W. 990; (1910) H. & T. C. R. Co. v. Lewis, (Texas), 129 S. W. 594; see obiter dictum contra in (1909) N. & W. R. Co. v. Stuart, (Va.) 63 S. E. 415; which is relied on in (1909) 1 Drinker on Interstate Commerce Act, sec. 261.

(17) (1908) Smeltzer v. St. L. & S. F. R. Co. (Ark.) 158 Fed. 649; (1910) St. L. & S. F. R. Co. v. Heyser, (Ark.) 130 S. W. 563.

(18) (1910) Welch v. N. & W. R. Co., 121 N. Y. S. 985.

(19) (1909) G. H. & S. A. R. Co. v. Wallace, (Texas), 117 S. W. 169.

(20) (1908) Smeltzer v. St. L. & S .F. R. Co., (Ark.), 158 Fed. 649; (1909) G. H. & S. A. R. Co. v. Wallace, (Texas), 117 S. W. 169; (1910) Welch v. N. & W. R. Co., 121 N. Y. S. 985; (1909) Riverside Mills v. At. C. L. R. Co. (Ga.) 168 Fed. 987; (1910) St. L. & S. F. R. Co. v. Heyser, (Ark.), 130 S. W. 563.

(21) (1909) G. H. & S. A. R. Co. v. Piper, (Texas), 115 S. W. 107; (1910) M. K. & T. R. Co v. Harriman, (Texas), 128 S. W. 932; see obiter dictum contra in (1909) N. & W R. Co. v. Stuart, (Va.), 63 S. E. 415; which is relied on in (1909) 1 Drinker on Interstate Commerce Act, sec. 261.

The Act has been held constitutional by all the courts before whom the question of its constitutionality has arisen, and its validity has been repeatedly affirmed in the decisions above referred to.[22]

IV. Limitation of Liability.—The constitutional validity of the amendment being conceded, as heretofore shown, the next question that arises is, has the carrier any right to limit its liability by contract for a valuable consideration?

Limitation of liability divides itself into two heads:

First: Limitation as to the place where the negligence occurs, and which carrier shall be primarily liable for such negligence, and

Second: Limitation of liability as to the value of the shipment, and what is reasonable notice of the loss thereof.

As to the first question; the principal and only purpose of this enactment, being to place the liability on the initial or receiving carrier, it is established by the authorities that since the passage of the Act, no carrier receiving an interstate shipment has the right or power to limit its liability to its own line by any "contract, receipt, rule or regulation," whether based on a valuable consideration or not, and any such contract is void. This also applies to an intermediate carrier,[23] and a connecting carrier.[24] It is evident if such a contract was permissible, the very purpose and intention of the Act would be frustrated, and this beneficial legislation would go for naught. The common law rule was, that the initial carrier was liable for its own negligence on its own line, or that of its connections, and it was only by reason of the exceptions grafted upon it by the American courts that the initial carrier has been able to escape liability by contract, so that, under this amendment, the initial or connecting carriers cannot by contract, etc., limit their liability to their own line.

(22) (1910) Barnes on Interstate Transportation, p. 493; (1910) Watkins on Shippers & Carriers, p. 268.

(23) (1910) St. L. S. W. R. Co. v. Ray, (Texas), 127 S. W. 281.

(24) (1910) Gibson v. L. R. & H. S. W. R. Co., (Ark.), 124 S. W. 1033.

The second question presents more difficulty, and only by considering the state of the law prior to the passage of this amendment, can we arrive at a clear understanding of it.

"While there are some cases to the contrary, it is almost universally held that a carrier cannot exempt himself by contract from liability for his own negligence. But many of the same courts which lay down this principle in its broadest form, at the same time hold that a carrier may by agreement avoid a portion of his liability but not all of it. This result is arrived at by holding that the parties to the contract of carriage may agree upon the valuation to be placed upon the goods carried, and since the freight rate is dependent upon the valuation, agreement for a diminished valuation is supported by the consideration of a reduced rate. Such is the holding of the United States Supreme Court in the leading case of Hart v. Penna. R. Co., 112 U. S. 331."[25]

The majority of the American courts have followed the rule of the Supreme Court of the United States, and at this late day it would be futile to question its soundness.

Congress did not intend by this amendment to change the state of the law with reference to limitation of liability as to value or negligence,[26] and this is shown in this case by the fact that the only thing under consideration was the question of fixing the liability on the initial carrier when a loss did occur, whether the negligence happened on its line or that of its connections.

This conclusion is irresistible from the language of Senator Richardson, of Alabama (quoted above), and also from the decisions since the passage of the Act; and is in accordance with the views of the Interstate Commerce Commission.[27]

The question is answered in a late case, decided by the Court of Appeals of New

(25) 8 Michigan Law Review, p. 223.

(26) (1910) St. L. S. W. R. Co. v. Ray, (Texas), 127 S. W. 281.

(27) (1908) Matter of Released Rates, 13 Interst. Com. R. 550.

York,[28] wherein it was attempted to have declared nugatory the provision in the receipt of the Adams Express Company, whose liability, because of a special rate, was limited to the sum of fifty dollars. In the lower court, it was decided that this amendment to the Interstate Commerce Act rendered this provision of the receipt void,[29] but it was reversed on appeal to the supreme court of that state,[30] and the supreme court's decision was affirmed on appeal in the court of appeals.[31] The decision of the supreme court has been cited with approval by the courts of New Jersey[32] and Masssachusetts[33] and the same reasoning for their conclusion is employed.

Mr. Justice Barlett, in his decision in the Court of Appeals,[34] says: "The language of the enactment does not disclose any intent to abrogate the right to common carriers to regulate their charges for carriage by the value of the goods, or to agree with the shipper upon a valuation of the property carried."

Some of the opinions in other courts seem to reach a different conclusion, but an examination of them discloses that they were not dealing with the precise question here involved, but other questions arising under the Act, and therefor their weight on this point is open to serious question.[35]

The carrier, also, by contract may stipulate that the shipper shall give notice within a certain reasonable time of any claim for loss, delay, or injury to the shipment, and this is not violative of the provisions of the Act.[36]

Therefore it may be safely concluded, that under a contract, supported by a valuable consideration, such as a bona fide reduced rate, etc., the carrier has a right to require the shipper to accept a reduction in the maximum liability for the shipment, and to give a reasonable notice of the claim for damages; and the weight of authority of courts deserving the greatest respect is in that direction.

V. General Application.—In the introduction, it was stated, that the Act had no application, except to shipments in interstate commerce; accordingly, no shipments in intrastate commerce are affected by any of its provisions. Some of the states, however, have statutes[37] or a provision in their Constitution,[38] regulating intrastate shipments. The rules of practice and procedure when the statute applies are similar to that employed in the state courts in like cases.

The statute does not have to be specially pleaded as the state courts take judicial notice of the public statutes of the United States.[39] It is, however, necessary to set forth in the declaration, the fact that the shipment arises out of interstate commerce, and this can be done by alleging the point of receipt by the initial carrier and the destination of the shipment.

The provisions of the Act do not affect "any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," and the shipper in interstate commerce has his election whether to proceed under the Act, or to waive the provisions thereof, and proceed under the law as it was pronounced prior to this enactment.[40] This saving clause is particularly beneficial in those states which have

(28) (1910) Greenwald v. Barrett, 199 N. Y. 170; 92 N. E. 218.

(29) (1908) Greenwald v. Weir, 111 N. Y. S. 235; 59 Misc. R. 431.

(30) (1909) Greenwald v. Weir, 115 N. Y. S. 311; 130 App. Div. 696.

(31) (1910) Greenwald v. Barrett, 199 N. Y. 170; 92 N. E. 218.

(32) (1909) Travis v. Wells, Fargo & Co. (N. J.) 74 Atl. 444; (1909) Flowman v. Childs, (N. J.) 74 Atl. 446.

(33) (1910) Bernard v. Adams Exp. Co., (Mass.), 91 N. E. 325.

(34) (1910) Greenwald v. Barrett, 199 N. Y. 170; 92 N. E. 218; this decision overrules the following cases; (1909) Silverman v. Weir, 114 N. Y. S. 6; (1908) Schulte v. Weir, 111 N. Y. S. 240; 59 Misc. R. 438; (1909) Vigouroux v. Platt, 115 N. Y. S. 880; 62 Misc. R. 364.

(35) (1909) L. & N. R. Co. v. Warfield & Lee, 6 Ga. App. 550; 65 S. E. 308; (1909) Holland v. C. R. I. & P. R. Co., 139 Mo. App 702; 123 S. W. 987; (1909) Blackmer v. M. & O. R. Co., 137 Mo. App. 479; 119 S. W. 1; (1909) K. C. S. R. Co. v. Carl, 91 Ark. 97; 121 S. W. 932; (1909) C. R. I. & P. R. Co. v. Miles, (Ark.), 123 S. W. 775.

(36) (1909) St. L. I. M. & S. R. Co. v. Furlow, 89 Ark. 404; 117 S. W. 517; (1909) St. L. & S. F. R. Co. v. Keller, (Ark.), 119 S. W. 254.

(37) See Georgia Code, 1895, sec. 2298.

(38) (1909) Latta v. C., St. P., M. & O. R. Co., (Neb.), 172 Fed. 850; (1909) L. & N. R. Co. v. Scott, 133 Ky. 724; 118 S. W. 990.

(39) (1909) L. & N. R. Co. v. Scott, 133 Ky. 724; 118 S. W. 990.

(40) (1909) Latta v. C. St. P. M, & O. R. Co., (Neb.), 172 Fed. 850; (1910) Schultz v. S. R. Co., 122 N. Y. S. 445; 66 Misc. R. 9.

either statutory[41] or constitutional provisions.[42]

Negligence must have occurred on the line of the initial carrier or on the line of one of its connections in the through shipment, whether intermediate or delivering, and the Act has no application when once the shipment has been completed and the delivering carrier has assumed the liability of a warehouseman.[42]

The fact that the receiving carrier's line is wholly within the state does not relieve it from liability in every case under the Act, and if the shipment is accepted by the intrastate carrier for a point outside of the state, and a through bill of lading issued, the Act applies.[44]

It has, also, been decided that under the provisions of sections eight and nine of the Interstate Commerce Act of February 4, 1887, and since this amendment, when a verdict is rendered against the carrier, and in favor of the shipper, the attorney for the shipper is entitled to a counsel fee,[45] but that decision is erroneous, because the section which provides for a counsel fee, also includes a fine to be imposed upon the carrier for the violation of its provisions. The court which awarded the fee is one of respectable authority, but its decision is clearly a misconception of the purpose and intention of this amendment.[46]

The Act took effect on the dates of its passage, to-wit: June 29, 1906, and all interstate shipments made since that time come within its provisions.[47]

Conclusion.—This amendment is of great value to shippers, as in a great many cases where an interstate shipment was involved, and where the value of the shipment was small, they were without remedy, because of the expense which would be entailed upon them together with the loss of time, in bringing suit in a foreign forum. The trend of the decisions has demonstrated that the courts are willing and ready to administer the provisions of this legislation with liberality, and, also, with a desire to do justice between the parties.[48]

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(41) See note 37.
(42) See note 38.
(43) (1909) N. & W. R. Co. v. Stuart, (Va.), 63 S. E. 415.
(44) (1910) Schultz v. S. R. Co., 122 N. Y. S. 445; 66 Misc. R. 9; (1910) H. & T. C. R. Co. v. Lewis, (Texas), 129 S. W. 594.
(45) (1909) Riverside Mills v. At. C. L. R. Co., (Ga.), 168 Fed. 990.
(46) See criticism in (1908) G. H. & S. A. R. Co. v. Piper, (Texas), 115 S. W. 107; (1910 Watkins on Shippers & Carriers, p. 267, and see 31 Sup. Ct. 164.
(47) (1910) So. Pac. Co. v. Meadors, (Texas), 129 S. W. 170; (1910) Barnes on Interstate Transportation, p. 492, Note 1; see contra (1908) Nicola v. V. L. & N. R. Co., 14 Interst. Com. R. 199.

(48) Additional authorities under the Act, but which merely refer to it, without special comment, are as follows: (1908) M. K. & T. R. Co. v. Carpenter, (Texas) 114 S. W. 900; (1908) I. & G. N. R. Co. v. Wilbourne, (Texas), 115 S. W. 111; (1909) St. L. S. W. R. Co. v. Grayson, 89 Ark. 154; 115 S. W. 933.

TROVER AND CONVERSION—MEASURE OF DAMAGES.

HENDERSON v. HOLLAND.

Appellate Court of Alabama, April 19, 1911.

55 So. 323.

It is discretionary with the jury, having regard to the circumstances, to assess the damages in trover at the highest market value of the article at any time between the conversion and the trial, or at an amount not less than its value at the date of the conversion, with interest, or at any amount within such limits; so that they should not be instructed that plaintiff is entitled to such highest price.

Plea 2 is as follows: "Now comes the defendant, and for answer to the complaint pleads and says: That the title to this bale of cotton, the subject of this suit, has heretofore been tried in the justice court of M. W. Coleman, a justice of the peace at Albertville, Marshall county, a court of the same jurisdiction as this court; that said suit was between the same plaintiff and defendant, that the suit was brought by plaintiff against the Albertville Mercantile Company for the same bale of cotton or its value, and the said bale of cotton having been sold by this defendant to the Albertville Mercantile Company, the said company called on the defendant, J. J. Henderson, from whom they bought said bale of cotton, to defend his title or claim to said cotton for them; and this defendant thereupon made himself defendant in said suit, went into trial on the merits of the case, and the plaintiff and the defendant offered evidence in support of their respective claims, and the court, after

hearing the evidence and the argument, considered the case, and found judgment in favor of the defendant under the law and evidence offered by the party, which judgment is duly rendered upon the merits of the case, and no appeal was taken from said judgment; and the defendant says that plaintiff is bound or concluded by the former judgment of the process." Amended plea 2 sets out the fact that the trial was had on the 5th day of December, 1908, in an action of trover in the justice court of M. W. Coleman, a justice of the peace in Marshall county, a court of competent jurisdiction, and then states the facts as stated in the former suit, with the conclusion that defendant avers that this suit is for the conversion for the same bale of cotton, and the evidence on this trial and the issues here involved will, under the first plea here filed, be the same as was heard in the court of said Coleman.

E. W. Darden, for appellant. T. B. Russell, for appellee.

WALKER, P. J. (1) The appellant, defendant below, by two special pleas—his second plea, and his second amended plea—sought to set up as an adjudication against the claim of the plaintiff asserted in this suit the result of a previous suit brought by the same plaintiff against the Albertville Mercantile Company; each of the pleas alleging in substance that the defendant, who had sold the bale of cotton in controversy to the Albertville Mercantile Company, took charge of and conducted the defense in that suit as though it had been brought against himself, and that judgment was rendered in that case in favor of the defendant therein. Assuming that the pleas show that defendant so conducted himself with the defense of that former suit as to be entitled to claim for himself the benefit of the judgment therein, yet it must be held that neither of the pleas shows that the result in that case was an adjudication against the claim asserted by the plaintiff in this suit. The averments of the second plea indicate that the former suit was an action of detinue for the bale of cotton. The second amended plea describes the former suit as an action for the conversion of the bale of cotton. The first mentioned plea does not negative the conclusion that judgment was rendered for the defendant because of a failure to prove possession of the cotton by the defendant in the suit; and the second mentioned plea does not negative the conclusion that there was judgment for defendant in that suit because of a failure to prove a taking or conversion by it of the cotton in question. For anything that appears in either of those pleas, that former judgment against the plaintiff may have been the result of his failure to prove a fact necessary to be proved to entitle him to judgment in that case, but which he is not required to establish in this suit against another party, though this suit relates to the same personal property which was the subject of controversy in the former suit. At any rate, neither of those special pleas shows an adjudication against plaintiff's claim or title to the bale of cotton mentioned in this suit; and there was no error in sustaining the demurrers to the pleas. Gilbreath v. Jones, 66 Ala. 129.

(2) There was evidence as to the highest market price of cotton between the time of the alleged conversion and the date of the trial. In the oral charge to the jury the trial court instructed them that "under the law, if the plaintiff, is entitled to recover at all, he is entitled to the highest market price for the cotton since the day it was taken to the present time," and the defendant duly excepted to this part of the charge. In actions for the conversion of personal property which is of a fluctuating value, it is competent to prove the highest market price of the article at any time between the date of conversion and the time of the trial; but it is discretionary with the jury to assess the damages of the plaintiff at a sum based on the highest market price, or on a price not less than the value of the article at the date of the conversion, with interest on the amount so ascertained. Boutwell et al. v. Parker & Co., 124 Ala. 341, 27 South. 309; Burks v. Hubbard, 69 Ala. 379; Loeb & Bro. v. Flass Bros., 65 Ala. 526. In such case the law vests the jury with a discretion in assessing the damages at any amount within the limits stated. In the exercise of that discretion they should have regard to the circumstances of the case before them. The conversion proved may have been inadvertent, and the defendant may not have reaped benefit from it beyond the market price of the article; or it may have been willful or wanton, and have been the means of enabling the defendant to get for himself the highest market price for the property of another, or of depriving the owner of the benefit of a rise in price. It is to enable them to adjust their assessment of damages to such varying situations that the jury is accorded a discretionary power in this matter. The right to exercise such discretion was denied them by the instruction above quoted. That action of the trial court was erroneous.

This error requiring a reversal of the judgment, it is not necessary to consider other questions presented.

Reversed and remanded.

NOTE.—*Recovery of Highest Value Between Time of Conversion and Rendition of Verdict.*—The trend of decision seems to be with the principal case in distinguishing between a willfully wrong conversion and one under claim of right, but it seems to us that property of fluctuating character, so far as value is concerned is not a good basis, but the Georgia rule hereinafter shown is a better rule.

The rule in Alabama of allowing the jury a discretion in fixing subsequent value was said in Boutwell v. Parker & Co., *supra*, to be limited to the taking of the market value at the time of the conversion or some higher, not necessarily the highest, subsequent value, and never to base their finding on a depreciated value. The opinion in that case says: "The reason for allowing the jury to assess damages according to the increased value is to prevent any benefit to the defendant from his wrongful act." That sort of rule ought, it seems to us, to demand the highest subsequent value, but the principal case argues that the jury have a discretion within the limits of market value at the time of conversion and highest subsequent value, according to the circumstances of the original taking and that the defendant shall not have actually reaped any benefit beyond the market price of the article at the time of taking. It may be well doubted whether there is any soundness in such discretion, if the owner has proceeded promptly to sue instead of laying by and speculating upon the possibility of a still higher price.

It must have been on this theory that a Montana statute gives, in trover and conversion "to the injured party one of two options, viz.: the market value at the time of conversion or the highest market value between the conversion and the verdict. But under such a statute it was held that the plaintiff in his action must elect one, and cannot rely on both in the same case," a rather technical sort of ruling it seems to us under a statute passed entirely for the injured party's benefit. See Thornton-Thomas Coal Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10. The rule under such a statute it seems to us should be that plaintiff should charge the conversion, and prove what value he could at any time from the time of the conversion to the day of trial. He ought not to have to elect because as a matter of fact he could not say at the time he files his suit what might be the highest value at the time of the verdict. If that exceeded the *ad damnum*, in the proof, he ought to be allowed to amend at the last moment.

In a North Dakota case it was said: "In fixing the measure of damages, the trial court determined that the plaintiff was entitled to the highest market price of the grain between the date of the conversion and the verdict, without interest, instead of the value of the property at the date of the conversion, with interest thereafter, and, against the defendant's objection, permitted plaintiff to amend its complaint at the trial to increase the amount of its demand for damages to correspond with the highest price of grain during the period between the conversion and the verdict, which was stipulated to have been in June, 1898, at which time wheat, by reason of the Leiter corner, reached the unnatural price of $1.42 a bushel, which was at least twice its value at the date of the conversion. The same question was also raised by objection to evidence of the highest market value and by an exception to that portion of the charge of the court, which fixed the highest market value, without interest, as the measure of damages to govern in case they found for the plaintiff."

The North Dakota statute merely says the damage from conversion is presumed to be value at the time of conversion or when the action is prosecuted with reasonable diligence the highest market value "at any time between the conversion and the verdict without interest at the option of the injured party." It was said: "In the case at bar the recovery for the wheat converted bears no just relation to the damage which the plaintiff suffered. It is a misnomer to call it "compensation." It is largely punishment. But, however averse we may be to the rule, it is the rule which governs; and the plaintiff has an absolute right to recover the highest market price, if it so elects, provided only it has prosecuted its action with reasonable diligence."

We see little occasion for the court to criticise such a rule, but it does occur to us it might have refused to declare that the "unnatural price" consequent upon the "Leiter corner" should be accepted as the highest market price. A "corner" is supposed to be an illegitimate influence upon the market and what it accomplishes ought not to be taken as such a market price as the law contemplates, when it speaks of "the highest market price." It is something of an anomaly for a court to denounce a price as "unnatural" and yet enforce it as a legitimate price. The Montana case does not show an express election as does the North Dakota case, and yet the Montana case says he should elect. The Montana court seemed to construe the statute as meaning that election is only necessary when the highest market value is asked for.

Leacock v. Paxon, 208 Pa. 602, 57 Atl. 1097, was a case in which it appears that some shares of the American Tobacco Company were purchased through brokers, and about one-third of their value was deposited with them. The purchaser paid in $3,000 more to protect the brokers against a decline, though they told him only $1,000 was needed. They sold his stock three days after this deposit without giving him any notice. As to the measure of damages it was said: "While it is true that, in the case of conversion of ordinary chattels, the measure of damages is the value at the time of the conversion, yet, in view of the shifting character of the prices of stock in our stock exchanges, such rule would be manifestly inadequate. It has, therefore, been held that stocks are an exception to the rule in question and the highest price in the market is consequently made the measure of damages.

The foundation of this rule rests upon the changing character of the value of such property as evidenced by the varying quotations in the different stock markets and sometimes the advances in value are made with astonishing rapidity. Political action or material or financial combinations often are the occasion of such exceptional advances. The very nature of such prop-

erty with its constantly changing valuations indicates the necessity of a measure of damages shifting in character, and hence it has been made to differ from that in case of ordinary chattels where it is based upon their valuation at the time of the conversion, because such value is not so changeable."

The case cites Pennsylvania decision, particularly that of Neiler v. Kelley, 69 Pa. 403, where Mr. Justice Sharswood said: "The general rule as to the measure of damages in an action of trover undoubtedly is well settled to be the value of the goods at the time of the conversion, to which may be added interest up to the time of the trial, unless there were some circumstances of outrage in the case, when the jury may give more. Here nothing is said about changing value, but "outrage" may embrace increased damages in the taking of any class of property.

Other Pennsylvania cases are referred to as sustaining modification of the rule as to "stocks, railroad bonds and other securities of similar nature." The principal case, however, and the North Dakota and Montana cases do not confine the modification to stocks, bonds and securities, but extends it to all property of fluctuating market value.

In Doyle v. Burns, 123 Iowa 488, 99 N. W. 195, there was a suit for the conversion of mining stock and the court's instruction was for the value at the time of demand for same together with dividends with interest on such value and dividends.

The Iowa court said the rule was in case of marketable stock "the highest value which it attains between the time of conversion and a reasonable time for replacing it, if the purchase price has not been paid, or if the purchase price has been paid, then the highest value between the conversion and the time of the bringing of the action, providing the bringing of the action is not unreasonably delayed."

The Doyle case approves of making the date of demand the time of valuation as this "does not allow either party to speculate at the expense of the other," and there ought not to be a rule which "presupposed that a plaintiff suing for conversion would have held his stock and sold it at the time it reached its highest market price, which, as we all know, is a very violent presumption."

As supporting the rule the Iowa court favors, there are cited Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Gallagher v. Jones, 129 U. S. 193; Chadwick v. Butter, 28 Mich. 349.

In Oxford v. Ellis, 117 Ga. 817, 45 S. E. 67, a syllabus decision states the matter very broadly, thus: "Where the plaintiff in an action of trover elects to take a money verdict, the value of the property converted, at the time of the conversion, or at some period between the conversion and the trial, must be proved to authorize a verdict." The statute may determine, we suppose, whether there is always an alternative, but the proposition does not on its face distinguish between property presumed to be of changing value and other property.

In Thompson v. Carter, 6 Ga. App. 604, 65 S. E. 599, we find this syllabus decision repeated in the case of conversion of a promissory note, and the Thompson case quotes Walton v. Henderson, 4 Ga. App. 173, 61 S. E. 28, as holding that: "In estimating the value of personalty unlawfully detained, the plaintiff may recover the highest amount which he can prove between the time of conversion and the trial." We judge, therefore, that in Georgia the rule of highest value is applied whenever a higher subsequent value may be proved than that at the time of conversion let the conversion be of an ordinary chattels or personal property of generally fluctuating value.

In Bavle v. Norris, 134 S. W. 767, the Texas Court of Civil Appeals held in a timber-cutting case, that the measure of damages was the value at the time of demand and where it is altered by manufacture the value in the altered state may be recovered, unless the taking was not culpably negligent and was under an honest belief of title, when the value would be as of the time of taking.

This proposition proceeds on the theory that bad faith in retention carries its legitimate burden, while for an act done in good faith only the actual wrong at the time was to be compensated for. There is nothing here passed upon in regard to fluctuation in value of the original article.

The Pennsylvania rule of confining increased price to stocks, etc., by reason of the nature of such property seems to us too restricted, but as a rule it would seem to be enforceable without regard to the circumstances attending the conversion, just because of that nature. As to other property, though it might fluctuate, that would seem to be incidental and not deemed in law to be contemplated in a good faith taking. Whether any damages should be measured by prices that are unnatural, as in the North Dakota case, we think very doubtful indeed. Those things are spasmodic and those who are looking for advantage from them are as truly gamblers as those who create them. Whether one whose wheat or whose cotton is converted would take the tide at its flood or be wrecked in its ebb, is so purely problematical, that no account should be taken of it as a basis for recovery of damages.

C.

HUMOR OF THE LAW.

One of the officials of our Embassy at London tells of an incident that occurred in a train proceeding through the north of Scotland. There was another passenger in the compartment at the time the American entered.

At the next station three Scots came in. They were all big, burly men and completely filled up the seat on the side of the compartment where the first mentioned passenger was seated. At the next station the carriage door opened to admit a tall, cadaverous individual, whose girth was about that of a lamp-post.

He tried to wedge himself in between two of the passengers already there, and said to one of them:

"Here, you must move up a bit. Each seat is intended to accommodate five persons, and according to act of Parliament you are entitled only to eighteen inches of space."

"Aye, aye, my friend," replied one of the Scots; "that's a very guid for you that's been built that way; but ye canna blame me if I ha' na' been constrickit according to act of Parliament."—Lippincott's.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival**—Another Action Pending.—Pendency in another jurisdiction of another action on the same cause of action is not ground for abatement.—McNamara v. McAllister, Iowa, 130 N. W. 26.

2. **Adultery**—Evidence.—In a prosecution for adultery evidence that the woman was pregnant at time of trial held competent as corroborating testimony.—Clark v. State, Ala., 54 So. 431.

3. **Annuities**—Apportionment.—Annuities are not apportionable except where for the benefit of a widow without other means or for married women living apart from their husbands or infants.—Wiegand v. Woerner, Mo., 134 S. W. 596.

4. **Assignments**—Rescission.—Plaintiff, having been offered a rescission of a contract of sale of his equity to his assignee for the benefit of creditors, and having refused and elected to treat the contract as valid, could not thereafter obtain a rescission.—Heath v. Tucker, Mo., 134 S. W. 572.

5. **Attachment**—Forthcoming Bond.—A forthcoming bond will be held good as a common-law bond, though it does not conform to the statute.—Blanchard v. Anderson, Ok., 113 Pac. 717.

6. **Bankruptcy**—Action Against Bankrupt.—Where the judgment of a trustee concurs with that of a great majority of the creditors who speak, that it would not be advisable or for the best interest of the estate to defend a pending suit against the bankrupt, he is justified in refusing to defend, and it is not error for the referee, on application of the minority, to refuse to direct him to do so.—In re Kearney, D. C., 184 Fed. 190.

7.——Contracts.—Where a bankrupt was prevented from carrying out the contract for a change of its location, because of financial embarrassment and bankruptcy, claimant, the other party to the contract, could not rescind and recover contribution made thereunder against the bankrupt's estate.—In re Morgantown Tin Plate Co., D. C., 184 Fed. 109.

8.——Discharge.—Discharge in bankruptcy of a former firm within six years held no bar to a subsequent discharge of a new firm in which one of the partners of the old firm was a member.—In re Neyland & McKeithen, D. C., 184 Fed. 144.

9.——Dissolution of Corporation.—Where a corporation had instituted proceedings in a state court for dissolution, such proceedings were not suspended by insolvency or commission of an act of bankruptcy.—In re Standard Cordage Co., D. C., 184 Fed. 156.

10.——Effect on Rights of Factors.—Where a factor purchased cotton for bankrupts with his own funds and did not ship the cotton to the bankrupts under their instructions, because of their bankruptcy, he was entitled to sell it for the best price obtainable and charge them with the loss.—Couturie v. Roensch, Tex., 134 S. W. 413.

11.——Exemptions.—Where property of a bankrupt has been properly set off to him as a homestead, the court of bankruptcy has no further jurisdiction over it, and the bankrupt's trustee has no equity therein that can be made the subject of a sale by him.—Sullivan v. Mussey, C. C. A., 184 Fed. 60.

12.——Proceedings for Contempt.—In proceedings for contempt before a court of bankruptcy while perhaps no pleading on the part of the respondent is necessary, it is often advantageous to set out the defense in a definite manner with a view of bringing the issues clearly before the appellate tribunal.—In re Goodrich, C. C. A., 184 Fed. 5.

13.——Proof of Claim.—A proof of claim in bankruptcy, which was defective in some substantial particular, may be amended either before or after the expiration of the year limited by Bankr. Act.—In re Kessler, C. C. A., 184 Fed. 51.

14.——Property Fraudulently Conveyed.—Where a bankrupt purchased deferred annuities with money fraudulently obtained from his creditors, the trustees could not recover the amount so paid from the insurance company, or cancel the contract, but was only entitled to the proceeds of a sale of the bankrupt's contingent interest in the contract.—Mutual Life Ins. Co. of New York v. Smith, C. C. A., 184 Fed. 1.

15. **Banks and Banking**—Action for Deposit.—The burden is upon a depositor, seeking to recover money deposited in a bank, to allege and prove a demand for repayment.—Newburger v. State Bank, 127 N. Y. Sup. 956.

16.——Neglect of Receiver.—A receiver of an insolvent state bank, failing to enforce stockholder's liability created by Const. art 8, sec. 7, and Banking Law (Consol. Laws, c. 2) sec. 52, held liable for the loss sustained.—People v. Bank of Staten Island, 127 N. Y. Sup. 906.

17.——Payment of Check.—A bank held required to know the state of its depositor's account, so that a payment of a check is good in the absence of fraud.—National Exch. Bank of Baltimore v. Ginn & Co., Md., 78 Atl. 1026.

18. **Bigamy**—Voidable Marriage.—A voidable marriage is sufficient basis for a prosecution for bigamy.—State v. Yoder, Minn., 130 N. W. 10.

19. **Bills and Notes**—Blank Endorsement.—A blank indorsement by the payee of a negotiable note does not make him a guarantor of the note.—Merchants' Nat. Bank of Santa Monica v. Bentel, Cal., 113 Pac. 708.

20.——Construction.—Where a blank for the rate of interest in a note was filled by drawing a line through the space left for the rate per cent. if such filling of the blank is regarded as a patent ambiguity, it would indicate that no interest was to be paid—Couturie v. Roensch, Tex., 134 S. W. 413.

21.——Presumptions.—Possession by payee of note bearing no indorsement held to raise presumption of non-payment.—Light v. Stevens, Cal., 113 Pac. 659.

22. **Carriers**—Contract for Carriage of Live Stock.—Where a railroad company contracted to carry cattle, to be shipped from a quarantined district, it cannot avoid liability for the damages caused by its refusal to receive the cattle from the connecting carrier, on the ground that it was without facilities for transporting them in the manner required by law with respect to such cattle.—Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co., C. C. A., 184 Fed. 15.

23.——Live Stock.—An initial carrier of live stock held not bound to permit its cars to go over the connecting line nor liable for damage resulting from unloading at the end of its line in the absence of negligence.—Galveston, H. & S. A. R. Co. v. Jones, Tex., 134 S. W. 328.

24.——Negligence.—A presumption of negligence on the part of a carrier held to arise on proof of injury to a passenger as the result of a jerk of the car.—McKittrick v. Greenville Traction Co., S. C., 70 S. E. 414.

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